

ATTORNEY GENERAL
STEPHEN E. MERRILL

DEPUTY ATTORNEY GENERAL
JEFFREY R. HOWARD

ASSOCIATE ATTORNEYS GENERAL
BRIAN T. TUCKER
ROBERT P. CHENEY, JR.

THE STATE OF NEW HAMPSHIRE



THE ATTORNEY GENERAL
CIVIL BUREAU
STATE HOUSE ANNEX
25 CAPITOL STREET
CONCORD, NEW HAMPSHIRE 03301-6397

(603) 271-3058

November 9, 1988

SENIOR ASSISTANT ATTORNEYS GENERAL
LARRY M. SMUKLER
PETER T. FOLEY

ASSISTANT ATTORNEYS GENERAL
JOHN T. PAPPAS
DANIEL J. MULLEN
DAVID S. PECK
STEPHEN J. JUDGE
DOUGLAS N. JONES
SUSAN S. GEIGER
EMILY G. RICE
CHARLES T. PUTNAM
MONICA A. CIOLFI
ROBERT E. DUNN, JR.

ATTORNEYS
CLAIRE L. GREGORY
MARTHA PYLE FARRELL

PARALEGAL
SUSAN M. GUNTHER

DEC 1 1988

Mr. Robert A. Ambrose
Deputy Secretary of State
Secretary of State's Office
State House
Concord, NH 03301

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Dear Bob:

I am enclosing the opinion letter of this Office relative to the processing of notary public and justice of the peace applications.

As we discussed in October, my suggestion is that Governor and Council receive a copy of our opinion along with those applications that do not satisfy the statutory requirements. This way, the body which actually confers the grant of office may decide whether to do so in those cases, or to pursue some alternate path such as seeking an advisory opinion pursuant to Pt. 2 Art. 74 of the New Hampshire Constitution.

Please do not hesitate to contact me if you have any questions.

Sincerely,

A handwritten signature in cursive script that reads "Monica".

Monica A. Ciolfi
Assistant Attorney General

MAC/daf
Enclosures



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November 9, 1988

Mr. Robert P. Ambrose
Deputy Secretary of State
Secretary of State's Office
State House
Concord, NH 03301

Dear Mr. Ambrose:

By memorandum of October 21, 1988 you have requested the opinion of this office relative to the processing by the Secretary of State of applications for notaries public and justices of the peace. Specifically, you have inquired as to whether applications for either office may be denied on the basis of their failure to satisfy a new requirement occasioned by the 1988 legislative amendments to the offices' respective statutes. Those amendments appear to incorporate a three-year New Hampshire voter requirement for all applicants.

For the reasons set forth below, it is the opinion of this Office that no application should be rejected for want of the voter status designation.

RSA 455:2, relative to notaries public was amended to require that "any person applying to be a notary public shall have been a registered voter in this state for at least 3 years immediately preceding the date of the application".

A slightly different situation exists in the case of a justice of the peace application. RSA 455-A:2, also adopted in 1988, directs that "(A)ny person applying to be a justice of the peace shall indicate on the application whether he or she has been a registered voter in this state for at least 3 years immediately preceding the date of application". The statute does not expressly condition application acceptance on the three-year registered voter status.



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The Secretary of State has issued two new application forms which incorporate the three-year statutory reference. However, while the statutes differ as to whether the voter status is a requirement, both forms provide a declaration that, along with being "of legal age, [and] a citizen", the applicant has "been a duly registered voter in the State of New Hampshire for at least 3 years."

A 1984 United States Supreme Court decision clearly indicates that any challenge to a state statute excluding aliens from eligibility for the office of notary public will invoke strict judicial scrutiny. Bernal v. Fainter, 467 U.S. 216 (1984). State law may only discriminate on the basis of alienage in order to advance a compelling state interest. The advancement must be by the least restrictive means available. This standard is only lowered when evaluating the validity of exclusions that entrust exclusively to citizens, important elective and nonelective positions whose operations go to the heart of representative government. Sugarmen v. Dongall, 413 U.S. 634 (1973).

In Bernal, the Court determined, while interpreting a Texas statute substantially similar to RSA Ch. 455, that notaries do not fall within the category of officials whose functions necessitate the exercise of broad discretionary power over the formulation or execution of public policies importantly affecting the citizen population. Bernal, 467 U.S. at 224. Since the Court found those functions to be essentially clerical and ministerial, the "political function" exception to the strict scrutiny rule was held to be unavailable.

None of the assertedly "compelling" state interests argued by Texas were considered by the court to justify the absolute and classwide exclusion. New Hampshire could offer no reasons that would be more compelling. Aliens, therefore, may not be denied eligibility for the office of notary public by virtue of their status as such.

Since under the New Hampshire law, the three-year voter requirement not only excludes by implication all aliens, but also that group of citizens who have not been registered voters in New Hampshire for three years, it too would fail to satisfy the Court's strict scrutiny analysis. This is because only United States citizens are eligible for voter registration in New Hampshire. See, RSA 654:1. In other words, to the extent New Hampshire law discriminates on the basis of the duration of one's voter status, it includes the absolute and classwide exclusion proscribed by the Bernal decision. The voter

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requirement thus cannot arguably be distinguished from the citizenship requirement.¹ Further, to whatever extent the requirement is a prerequisite to eligibility for the office of justice of the peace, it is improper as well, because of the virtual identity of the offices' functions. See RSA 455:3 (Cum. Supp. 1988).

Accordingly, applications for both offices should be processed in the ordinary course, notwithstanding an applicant's failure or inability to declare the statutory registered voter status.

I trust that this has been responsive to your request. Please do not hesitate to contact me if this Office can be of further assistance.

Sincerely,



Larry M. Smukler
Senior Assistant Attorney General



Monica A. Ciolfi
Assistant Attorney General

MAC/daf
0-88-058

¹ Were New Hampshire to permit aliens to register to vote, the subject relationship would be that between the durational voter status requirement itself and the requisite functions of the two offices. We decline to address this theoretical question in this opinion.